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IN THE

Supreme Court of the United States

OCTOBER TERM 1965

No. 1123

HAROLD WEINHART,
Petitioner,
v.
UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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No.....

HAROLD WEINHART,
Petitioner,
v.
UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Harold Weinhart, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above cause on February 5, 1966.

OPINION BELOW

The opinion of the Court of Appeals for the Sixth Circuit, (not yet reported), is printed as Appendix 1, *infra.*

JURISDICTION

The judgment of the Court of Appeals was entered on February 5, 1966 (p. 14). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1) and Section 1254 (3).

QUESTIONS PRESENTED

1. Was the Petitioner such a person who was subject to the provisions of the Labor Management Relations Act of 1947, 61 Stat. 136 *et seq.*, as amended, or as cited as the Labor and Management Reporting and Disclosure Act of 1959?

2. Were the comments of the attorney for the Government on the Defendant's (Petitioner's) failure to take the stand and present witnesses on his own behalf made to the jury grounds for reversible error?

3. Was it error for the trial judge to allow the jury to take into the jury-room after two and one-half hours of deliberation the Indictment filed by the Government?

CONSTITUTIONAL PROVISION INVOLVED

Fifth Amendment of the Federal Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The various constitutional provisions and statutes involved in this case are set forth in Appendix 2, *infra*, p. 14.

STATEMENT

This case involves the trial of Petitioner upon an Indictment, the first count of which charged a conspiracy, between Petitioner and one Louis T. Ralston and diverse persons unknown, to commit an offense against the United States of America, to wit: to violate Section 186 of Title 29, United States Code and that in pursuance thereof defendants did commit certain specified overt acts.

Under the second count, it is averred that on or about July 19, 1963, the Petitioner, Harold Weinhart and the aforesaid Louis T. Ralston did unlawfully, wilfully and knowingly request the payment of an unspecified sum of money from officials of Michigan Chrome in violation of Section 186 (b) of Title 29 and Section 2 (a) of Title 18, United States Code. (1a4a).*

---

*This Petition makes reference to the following: Appendix for Appellant, used in the Court below and the Appendix to this Petition which is a part hereof. References to the Appendix for Appellant are designated by "a" following the page number. Reference to the Appendices to this Petition are designated by "App." preceding the page number. References to other materials are specifically descriptive.

Upon the charges so laid, the Jury found Petitioner guilty on both counts (38a).

At the conclusion of the Assistant United States District Attorney's opening statement, counsel for Petitioner moved for a directed verdict of acquittal upon the ground that the necessary elements to bring the Petitioner within the jurisdiction of the Taft-Hartley Act, as amended, were not present (4a-5a), renewing said motion at the close of the Government's case (12a).

The Government, to sustain the burden of proof, relied upon the testimony of four witnesses, the first of whom, Robert J. Huber, President of Michigan Chrome, testified upon cross-examination, that he mentioned that he would contact the Petitioner on the following Monday and give him an answer as to when he could give him an answer; that there was no plan set up as to how this matter was to be handled; that no money whatsoever was paid by him to Petitioner or deposited to his account; that no one else had done so and that it was dropped at the last meeting he had with Petitioner and that the only trouble he had had with the Teamsters Union had occurred six years prior to the time in question (6a-7a).

Mary Solis, an employee of the Union, testified that Petitioner does not work for her union and that she had never before seen him (8a).

Donald L. Bullis, testified, upon cross-examination that he had never before seen the Petitioner; that to his knowledge he was not at the union hall when he saw Mr. Ralston; that Mr. Ralston never mentioned to Petitioner as being in touch with the company and that Mr. Ralston told him that if he wanted a union, he, Ralston, would send a telegram and that Petitioner's name was never mentioned (9a).

Marian Janukaitis, the last of the four witnesses above referred to and an employee of Michigan Chrome, testified, upon cross-examination, that her fellow employees wanted a union because they desired a pension plan; that she had never seen the Petitioner around the plant and that she had never seen him at any time until appearing as a witness at the trial (9a-10a).

The Government having rested, counsel for Petitioner moved for a directed verdict of acquittal based upon the following grounds:

1. For the reasons set forth in the motion made at the close of the Government's opening statement; and
2. That the Government had not sustained the burden of proof.

The Trial Court stating that the motion would be overruled, counsel for Petitioner thereupon moved that in the alterative, since there was not sufficient proof for both counts to go to the jury, that an election or striking of one count be made. The Court overruled both motions, stating that, "It might be thin, but it's enough" (10a-12a).

Counsel for the Government, in his closing argument, commented upon the failure of Petitioner to testify in his own behalf; stated that he had presented no evidence by virtue of his plea of not guilty, since such plea was not made under oath (13a) and that counsel for Petitioner, as an elementary matter, had the right to subpoena witnesses (35a). The Court took counsel's motion under advisement (35a). Prior thereto the Court, in commenting upon the motion made by reason of reference being made to Petitioner's failure to testify, stated: "I think it is rather close, I must confess" (33a).

Three times the Indictment was presented to the Jury and upon being unable to agree, at their request and over counsel's objection, they were permitted to take the Indictment to the jury-room (35a-37a).

Thereafter, counsel filed a motion for a new trial which the Court denied (41a-43a).

REASONS FOR GRANTING THE WRIT

1. Count 1 of the Indictment charges a conspiracy to violate Section 186 of Title 29 U.S.C.—Count 11, the actual commission of sub section (b) and of Section 2((a), Title 18, U.S.C. The one charges a conspiracy, i.e. an agreement to violate the Act, and the other, the actual violation of the Act by the commission of the substantive offense itself.

As was said in *Curtis v. United States,* (CCA 10), 67 F. 2nd and *Lisansky v. United States,* (CCA 4), 31 F. 2nd, 846, the conspiracy to commit the offense alleged is in such close connection with the objective offense as to be inseparable.

In *Gebardi v. United States,* 287 U.S. 112, 77 L. ed. 210, where a man and a woman, not then husband and wife, were convicted under an Indictment charging a conspiracy to transport the woman, from one state to another, in violation of the Mann Act, this Court, in reversing the conviction affirmed by the Court of Appeals, held in part, as follows:

> "The Act does not punish the woman for transporting herself; it contemplates two persons—one to transport and the woman or girl to be transported. Of this class of cases we say that the substantive offense involves the same combination or community of purpose of two persons only one of which is

> prosecuted here as a conspiracy. * * * where it is impossible under any circumstances to commit the substantive offense without co-operative action, the preliminary agreement between the same parties is not an indictable conspiracy either at common law, *Shannon v. Com.*, 14 P. 226, or under the Federal statute."

2. Count One of the Indictment charges a conspiracy between Petitioner, Harold Weinhart, and an alleged Union officer to violate Section 186 of Title 29, United States Code and following a description of the alleged Overt Acts, avers also that the same was in violation of Section 371 of Title 18, United States Code.

Count Two of the Indictment incorporating therein by reference to Count One again charges the commission of the conspiracy and also the commission of the substantive offense set forth in Section 186 (b) of Title 29 and section 2 (a) of Title 18, United States Code.

Section 186(a) Title 29 U.S.C. provides in part, as follows:

> "It shall be unlawful for any employer or association of employers or any any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer, to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value— * * *."

Section 402, Title 29 U.S.C., under the heading "Definitions," subsection (m), reads as follows:

> "'Labor relations consultant' means any person who, for compensation, advises or represents an employer, employer organization or labor organization concerning employee organizing, concerted activities, or collective bargaining activities."

The Indictment in the case at bar makes no mention of the statutory definitions above set forth. It merely avers that Harold Weinhart, a defendant, * * * *"represented himself to officers of Michigan Chrome as a labor relations advisor."* It does not aver in the language of the statute the class designated therein, to which he allegedly belonged. In order that a person might be subject to the penal provisions of the Act, he must perforce have been, not a mere pretender, but in the language thereof, actually a labor relations expert, adviser or consultant to an employer, who for compensation represents an employer, employer organization or labor organization. Not only does the Indictment fail to aver that he is a member of the class liable to prosecution, as therein set forth, but it is silent as to whom he "represented himself" as a labor relations adviser.

In *Farnsworth v. Zerbst* (1938); CCA 5th. 98 F. 2nd 541, and *State v. Davis* (1932) 203 N.C. 13, cert. den. 287 U.S. 649, 77 L. ed. 561, it was held that it must appear that one or more of the conspirators had the capacity to commit an offense, which the defendant alone is incapable of committing, to sustain a conviction for conspiracy to violate such act.

> "Where an act passed by the legislature embodies a definition, it is binding on the courts. (*Collins v. Texas,* 223 U.S. 288, 56 L. ed. 439.) Where a statute contains its own definition of a term used therein, the term may not be given the meaning in which it is employed in another statute, although the two may be in *pari materia.* (*Davison v. F. W. Woolworth Co.,* 186 Ga. 663, 198 S.E. 738, 107 ALR 1306.)"
>
> *50 Am. Jur.* "Statutes", Sec. 262.

In *People v. Meisner* (1913), 178 Mich. 115, 117, the Supreme Court of Michigan, recognizing the doctrine of *Ejusdem Generis*, held as follows:

> "Whenever an ordinance or statute fixes a classification and creates an offense which can be committed only by persons within the class, *it is necessary, not only to allege, but to prove that the accused belongs to* the class described. * * *"

In *State v. Kreuger*, 134 N. 263, the Supreme Court of Missouri said:

> "* * * Where a particular class is spoken of and general words follow, the class first mentioned is to be taken as the most comprehensive and the general rules treated as referring to matters *ejusdem generis* with such class.
>
> The specific words of the statute are 'if any judge or clerk of any election authorized by law or any other persons' must be construed to mean other persons legally connected with such election, as officers or otherwise. * * *"

See, Id: *Maiatico v. U.S.*, 302 F. 2nd, 880 and
Bumpus v. U.S., 325 F. 2nd 264.

3. The jury returned a verdict of guilty on both counts. By this, was it meant that the lone defendant on trial was convicted of the conspiracy charge contained in Count I, reincorporated in Count II, and also of the substantive offense set forth in Count Two? We submit that since Petitioner was not averred to come within the members of the class as set forth in the statutory definition, and that there was no proof that he did, that the conviction should not be permitted to stand.

In *United States v. Fabrizio,* D.C. Del. 1961, 193 F. Supp. 446, cited in the footnotes to Sec. 186 Title 29 USC., it was held that the prosecution has the burden to overcome evidence which tends to bring the defendant within exception of this section under which he is being prosecuted.

In *United Statess v. Bathgate,* 246 U.S. 220, 62 L. ed 676 and *United States v. Gradwell,* 243 U.S. 476, 61 L. ed 857, this Court held that a conspiracy to bribe voters at a general election within a state where Presidential Electors and Members of Congress are to be chosen, is not punishable as a conspiracy "to commit any offense against the United States or to defraud the United States in any manner whatsoever or for any purpose."

4. The 6th cir., amongst other things affirmed the denial of the motion for a new trial for some of the reasons already above discussed but also held that the verdict was not contrary to the law and evidence; that the court did not commit reversible error in allowing the Government's attorney, in his closing argument to state to the jury, and to stress the fact that defendant did not take the stand, or produce witnesses in his own behalf; that his plea of not guilty was not evidence of his innocence, because not made under oath, and that the trial court did not commit reversible error in allowing the jury, long after they had begun their deliberations, to take the Indictment to the jury-room with them.

That the Government failed to sustain the burden of proof is readily to be seen by perusing the appendix setting forth the testimony of the Government's four principal witnesses. Upon motions for aequital, etc., being made, the Trial Court as to the evidence conceded, that *"It might be thin but it's enough."* (App. 12a). No authority need be cited in support of the fundamental principle

of American Jurisprudence, that no man's liberty should be forfeited by reason of testimony and/or *evidence so "thin"* that the verdict must be made to depend, on conjecture, guess, inferences, speculation, et cetera, et cetera.

Our Bill of Rights which provides that no person accused of crime shall be forced to be a witness against himself, or to produce witnesses to prove his innocence, most prosecutors with meticulous care, not only avoid making mention of, but join counsel in urging that it must not under any circumstances whatsoever, be considered in evidence in arriving at a verdict of guilt.

In *Eddie Dean Griffin, Petitioner, v. State of California,* (1965), 85 S. Ct. 1229, this Court, speaking through Mr. Justice Douglas, reversed the jury's verdict of murder in the first degree for the reason that the Trial Court, in its instructions to the jury, commented upon the failure of Petitioner to take the witness stand in his own behalf, although a California statute permitted the Court so to do, and held as follows:

> "We said in *Malloy v. Hogan, supra,* p. 11, that 'the same standards must determine whether an accused's silence in either a federal or state proceeding is justified.' We take that in its literal sense and hold that the Fifth Amendment, in its direct application to the federal government and its bearing on the States by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt."

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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EDWARD P. ECHLIN,
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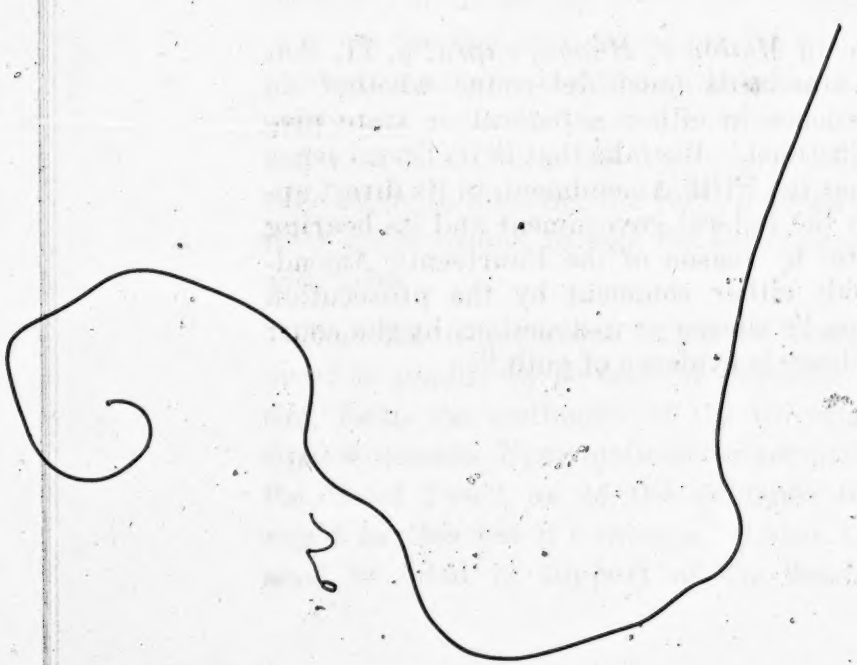

APPENDIX 1

OPINION OF THE COURT OF APPEALS

No. 16,411

UNITED STATES COURT OF APPEALS
for the Sixth Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
HAROLD WEINHART,
Defendant-Appellant.

ORDER

(Filed February 5, 1966)

Before WEICK, Chief Judge, O'SULLIVAN, Circuit Judge, and CECIL, Senior Circuit Judge.

Upon consideration of the appeal, we find that there was substantial evidence in the record to support the judgment of conviction in this case, and that no error of a prejudicial nature occurred at the trial.

It is therefore Ordered that the judgment of conviction be and it is hereby affirmed.

Entered by order of the Court.

/s/ Carl W. Reuss,
Clerk.

APPENDIX 2

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the Constitution provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Section 186(a), Title 29, U.S.C. provides:

> "It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant of an employer or who acts in the interest of an employer, to pay, lend, or deliver, or agree to pay, lend or deliver, or agree to pay, lend or deliver, any money or other thing of value—

"(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

"(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are engaged in an industry affecting commerce; or

"(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group of employees, directly or indirectly, to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

"(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

"(b) (1) It shall be unlawful for any person to request, demand, receive, or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a).

Section 402, Title 29, U.S.C., under the heading, "Definitions" reads as follows:

(m) "Labor relations consultant" means any person who, for compensation, advises or represents an employer, employer organization, or labor organiza-

tion concerning employees organizing, concerted activities, or collective bargaining activities."

Section 2 (a), Title 18, U.S.C. provides that:

"Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

Section 371, Title 18, U.S.C. reads as follows:

"If two or more persons conspire, either to commit any offense against the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined * * *."

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1123

HAROLD WEINHART, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted of conspiring with, and aiding and abetting, a union official in requesting a payment from the officials of the Michigan Chrome and Chemical Company, in violation of 29 U.S.C. 186, 18 U.S.C. 371 and 18 U.S.C. 2(a).[1] He was sentenced to im-

[1] The union official pleaded guilty before trial.

prisonment for one year (1 R. 1-4, 38, 44),[2] and the court of appeals affirmed *per curiam*.

1. Relying on testimony that petitioner was not an authorized representative of any employees of Michigan Chrome and Chemical Company, petitioner argues that he was not a person subject to the prohibitions of the Taft-Hartley Act, 29 U.S.C. 186.[3] Pe-

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[2] "1 R." and "2 R." refer, respectively, to the appellant's and the government's appendices in the court of appeals.

[3] 29 U.S.C. 186(a) and (b)(1) provide as follows:

> (a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—
>
> (1) to any representative of any of his employees who are employed in an industry affecting commerce; or
>
> (2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or
>
> (3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or
>
> (4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his

titioner's co-defendant, however, the Secretary-Treasurer and Business Representative of the Teamster's local named in the indictment, was clearly subject to the statute. *United States* v. *Ryan*, 350 U.S. 299, 302. It is well settled that a person who is not himself within the class defined by a criminal statute may aid and abet the commission of an offense (*Coffin* v. *United States*, 156 U.S. 432, 446-447; *Coffin* v. *United States*, 162 U.S. 664, 666-667) or conspire to commit it (*United States* v. *Holte*, 236 U.S. 140, 144-145; *United States* v. *Rabinowich*, 238 U.S. 78, 86). It is therefore not necessary to reach the question whether petitioner's representation that he was a "labor relations advisor" would, independently of his connection with his co-defendant, bring him within the statute as one who "seeks to represent" the employees of the company.

2. Petitioner's counsel made the following argument to the jury (2 R. 1):

> There was no need for the defendant to testify. He gave his explanation in this case when he was first questioned and it still stands and he says he wasn't guilty then and he says that now he is not guilty.

In reply, government counsel made the following argument, to which petitioner excepted (1 R. 35):

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actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b) (1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

> Mr. Prosser [petitioner's counsel] indicated there has been no testimony by the defendant himself, I don't mean evidence in his behalf, but he did not take the stand and you should not use this against him, and that is very true. The law does protect a man in that kind of situation. On the other hand, Mr. Prosser did say something in that connection which is not quite true, not quite accurate. He said Mr. Weinhart has presented evidence to you by his plea of not guilty. That is not so. Mr. Weinhart was never on the witness stand and any plea of not guilty that he made was not made under oath.

The court instructed that no inference of guilt was to be drawn from the failure of petitioner to testify (1 R. 17-18).

The argument of petitioner's counsel that petitioner had made an "explanation in this case when he was first questioned" was neither fair nor accurate. It was a proper reply that petitioner had never been on the witness stand and that his plea of not guilty was not under oath. Especially in view of the court's clear instruction on the subject, there was no error. *Baker* v. *United States*, 115 F. 2d 533, 544 (C.A. 8), certiorari denied, 312 U.S. 692.

3. During its deliberations, the jury asked to have a copy of the indictment. Over petitioner's objection, the court granted the request but cautioned the jury as follows (1 R. 36-37):

> I must repeat, it is not evidence of any kind against the accused, and does not create any presumption or permit any inference of guilt.

> If you wish it, for the purpose only of seeing the charge herein—don't forget, I read it to you twice—then I want you to approach it from that viewpoint, and that viewpoint alone.

This was a proper exercise of discretion, especially in view of the cautionary instruction which the court gave. *Haupt* v. *United States*, 330 U.S. 631, 643; *United States* v. *Press*, 336 F. 2d 1003, 1016-1017 (C.A. 2), certiorari denied, 379 U.S. 965.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL 1966.

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UNITED STATES OF AMERICA,

PETITION FOR REHEARING

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IN THE

Supreme Court of the United States

OCTOBER TERM 1965

No. 1123

HAROLD WEINHART,
Petitioner,
v.
UNITED STATES OF AMERICA,

PETITION FOR REHEARING

Harold Weinhart presents this his petition for a rehearing of the above entitled matter, and, in support thereof, respectfully shows:

1. That due to Counsel's endeavor to be concise, other grounds of a substantial nature or of controlling effect as will more fully hereinafter be set forth, were not presented and as permitted by Supreme Court Rule 58.

2. That before Counsel was able to file a reply brief to the Government's Memorandum Brief herein, decision was made.

3. That in the Government's Memorandum brief, several erroneous conclusions as to the law, the rules of evidence and statements as to facts which were not, and could not properly be received in evidence, were set forth, which are as follows:

—1—

In said Memorandum Brief, the statement is set forth at the very first page under foot-note 1, that Petitioners co-defendant the union official pleaded guilty before trial. Why this wholly extraneous matter should be interjected is difficult to comprehend as being for any other purpose than to attempt to prejudice the petitioner before this Court, or the Justice who denied the petition. Certainly, if testimony had been received to establish that a co-defendant had pleaded guilty it would have been reversible error. Moreover, not a single scintilla of evidence was offered by Government witnesses to the effect that Ralston and Weinhart either knew each other or were ever seen together. We have always thought and still firmly believe that in all courts this side of the Iron Curtain that "*guilt by association*" is not conducive to a fair and impartial trial, is of no evidentiary value whatsoever, and more than that, to attempt so to condemn an accused would be a highly reprehensible act.

The purpose of bringing this matter to the court's attention, although the record is devoid of any mention of it, is that it at least leads to the suspicion that the object in so doing was to prejudice the accused.

Next, the Government Counsel contend in the Memorandum Brief (pp. 2, 3) that even if Petitioner was not a Labor Relations expert, adviser, or consultant, as defined

in the Act of Congress, Title 29, U.S.C. 186, he was liable upon the theory that he comes within the purview of some unspecified and undesignated criminal statute, which makes him liable to prosecution for the violation of the provision of the Taft-Hartley Act *supra, if he aids and abets another in the commission of the offense.*

However, Petitioner was not charged with aiding and abetting, but could only be charged with the commission of the substantive offense. In 27 Am. Jur., p. 653, Section 93, the law is stated to be as follows:

> "It is the strict rule of the common law that one who participates in the commission of a crime must be charged as such in an indictment or information and that one who aids and abets the commission of the offense must be charged as such, and not as principal. Expressed in other terms, this rule is that one charged as a principal only cannot be convicted as an accessory or accomplice. * * *"

Coffin v. U. S. (1894), 156 U.S. 432 and 162 U.S. 664 are cited by Government counsel as apparent authority for the argument as to aiding and abetting. However, in *Coffin,* the defendant was charged with soliciting or inciting to the commission of crime (quite a different offense than that charged in the case at bar) in violation of the Revenue Statute, then in force, pertaining to national banks and which specifically defined aiding and abetting an officer, etc., of a national bank as being a violation of such Act. It is difficult to understand how it can be seriously contended that this case is authority for any issue involved in the case at bar.

In *United States v. Holte,* 236 U.S. 140, next urged as authority, it was there held that a woman could conspire with another to commit an offense against the United

States, although the object of the conspiracy, was her own transportation in interstate commerce for purposes of prostitution.

In a much later case, cited in our brief (6), *Gebardi v. United States,* 287 U.S. 112, 77 L.ed. 210, this Court held as follows:

> "*The Act does not punish the woman for transporting herself;* it contemplates two persons—one to transport and the woman or girl to be transported. *Of this class of cases we say that the substantive offense involves the same combination or community or purpose of two persons only one of which is prosecuted here as a conspiracy where it is impossible under any circumstances to commit the substantive offense without co-operative action, the preliminary agreement between the same parties is not an indictable offense either at common law, Shannon v. Com., 14 p. 226, or under the Federal statute.*" (Emphasis added.)

In *United States v. Rabinowich,* 238 U.S. 78, 86 (1914) likewise relied upon by Government Counsel for the argument as to aiding and abetting, which obviously they feel is the only shield they have for affirmance, the Court contrary to their claim and actually in support of petitioner's contention, held that under Criminal Code, section 37, *a conspiracy to commit a crime is a different offense from the crime that is the object of a conspiracy.*

THE INDICTMENT CHARGES NO OFFENSE AGAINST THE STATUTES OF THE UNITED STATES.

Count One of the Indictment charges petitioner and Louis T. Ralston with a conspiracy to violate Section 186, (a) Title 29, U.S.C.A.

Count Two charges petitioner and the said Louis T. Ralston with having violated Section 186 (b) of the same Act.

Count One therefore charges a conspiracy to violate a specific Act and Count Two charges the substantive offense of violating the same Act. Petitioner was convicted of both crimes.

Title 29, U.S.C. 186 (a) provides in part as follows:

> "(a) It shall be unlawful for any person *who acts as a labor relations expert, adviser or consultant to an employer, or who acts in the interest of an employer, to pay, lend, or deliver, any money or other thing of value.* * * *
>
> (2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or
>
> (4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions or duties, as a representative of employees or as such officer or employee of such labor organization."

Count One charges that petitioner *"represented himself to officers of Michigan Chrome as a labor relations advisor"*.

Count Two, adopting by reference all of the allegations of Count One, likewise charges that petitioner *represented himself* to Michigan Chrome, the employer, *as a labor relations advisor*. We pause to inquire as to why, if *he was a representative of the employer,* as defined in the Act, it became necessary for him to *represent that he was such employers labor relations advisor?*

Be that as it may, Congress in no unmistakable terms, and in language so clear and plain "that all who run may read", thus defined petitioner's alleged position:

> (m) "Labor relations consultant" means any person who, for compensation, advises or represents an employer, employer organization or labor organization concerning employee organizing, concerted activities, or collective bargaining activities."

The Indictment contrary to the definition Congress sets forth in the Act is otherwise described as follows: viz: that he *"represented himself to officers of Michigan Chrome as a labor relations advisor"*, despite the statutory definition as aforesaid. Under the Act, in order to be guilty of the substantive offense, he must perforce have been *the* representative of the employer, Michigan Chrome, and its agent or employee, and *not one who represented or pretended that he was such representative.*

In *27 Am. Jur.*, p. 656, Section 99, it is said:

> "As a general rule, an indictment or information charging an offense denounced and defined by statute should be as fully descriptive of the offense as in the language of the statute, and should allege

> every substantial element of the offense defined by the statute, without material diversion or departure from the fair intendment of the terms of the statute and with reasonable particularity of time, place and circumstances. * * *"

Citing *inter alia: Potter v. United States,* 155 U.S. 438, 39 L.ed. 214; *United States v. The Neurea,* 15 L.ed. 531:

> "* * * it is now well settled that except as to treason there are no common law offenses against the United States". 14 Am. Jur., p. 766, Sec. 15, citing *inter alia: Donnelley v. United States,* 4 L.ed. 426 and *United States v. Gradwell,* 243 U.S. 476, 61 L.ed. 857.
>
> "There are some offenses which are so defined by statute that they may be committed only by certain persons or classes of persons. * * *" 14 Am. Jur., p. 819, Sec. 73.

—3—

Realizing that the petitioner must be one of that class of persons defined in the Act as being capable of committing the offense denounced by the statute, counsel for the Government cite and rely upon, *United States v. Ryan,* 350 U.S. 299, 302. In that case, however, beyond any question of a doubt, the president of a union, who was also its principal negotiator, and who was described as such in the indictment, was one of the class of persons described in Section 186 (a). It was charged that in such capacity he received moneys or other things of value, from the employer. *He was not charged with representing himself to be such president and principal negotiator.*

In *United States v. Donovan* (1964), (C. A. 7th), 33 Fed. 2nd, 404, 407, where a violation of Title 29 U.S.C.A., Section 186(b), which pertains to persons to whom moneys

are paid by employers, labor advisors, etc., the Court held as follows:

> "It is an elementary principle of criminal pleading that where the definition of an offense employs generic terms it is not sufficient to charge the offense in such generic terms but the indictment must state the species—it must descend to particulars. *Russell v. United States,* 369 U.S., 749, 765, 8 L.ed. 2nd 240. The basis upon which this principle rests —the necessity that the indictment inform the accused with reasonable certainty of the specific offense with which he is charged—is, in, our opinion equally applicable where the statute, as it here does, proscribes different types of conditions in the disjunctive. * * *"

Count One of the indictment charges that petitioner, who *represented himself* to officers of Michigan Chrome *as a labor relations advisor,* entered into a conspiracy with Louis T. Ralston, *whom the Indictment charges, was the Secretary-Treasurer and Business Representative of Local 233,* to violate Section 186 of Title 29, United States Code.

Count Two of the Indictment charges that *Weinhart, who represented himself to be a labor relations advisor* and Ralston, whom the Government charges with not representing himself to be, but who actually was the Secretary-Treasurer and Business Representative of Local 233, did unlawfully, wilfully and knowingly request the payment of an unspecified sum of money from officials of Michigan Chrome in violations of Section 186 (b) of Title 29, and Section 2 (a) of Title 18, United States Code.

Thus, petitioner is not charged under Section 186 (a) with conspiring to pay, lend, or deliver, or agreeing to

pay, lend, or deliver, any money or other thing of value to any labor organization (the only offense the act denounces *which one who is a labor relations expert* as defined in said Act, *or even as one who* in the language of the Indictment *represented himself to be a labor relations advisor* could commit) but with an alleged offense nowhere to be found within the "four corners" of Section 186 of Title 29 United States Code.

To have been guilty of a violation of Section 186 it became necessary for the Government to charge and prove:

(a) That petitioner was in fact and in law (as defined in the Act) a Labor Relations advisor *and not that he represented himself to be a Labor Relations advisor;* and

(b) That he, as an actual Labor Relations advisor, and not as a pretender to that office, did pay, agree to pay, lend, or deliver, any money or other thing of value—

> (1) "to any labor organization, * * *, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are engaged in an industry affecting commerce; or
>
> (2) "to any employee or group or committee of employees of such employer in excess of their normal compensation for the purpose of causing such employee or group or committee to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or
>
> (3) "to any officer or employee of a labor organization * * * with intent to influence him in respect to any of his actions, decisions or duties as a representative of such labor organization."

The sole purpose of the Act is to guarantee to all who toil for an employer engaged in an industry affecting commerce, the right to organize, bargain collectively, etc., by prohibiting the illegal payment of money and/or in the demanding of moneys, etc. by the person or persons described in the Act to payees who are likewise described and defined in said Act.

With none of the acts condemned, does the indictment charge petitioner and the overt acts charged are not concerned with the payment of moneys, etc., but with the making of telephone calls, of meetings in a restaurant, and sending a telegram.

The Indictment is fatally defective in that:

(a) it does not charge the offense described in the Act; and

(b) *it does not charge that petitioner* as defined in the Act as one of the persons having the capacity to commit the offense defined *was in fact and in truth a Labor Relations advisor—it merely charges that he so represented himself to be.*

Count Two of the Indictment charges petitioner with violating Section 186 (b) of Title 29, United States Code, which provides as follows:

"(b) It shall be unlawful for any person to request, demand, receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a)".

The Indictment is further fatally defective in that:

(a) Count Two attempted to fix petitioners status as being a Labor Relations advisor—it merely avers that he represented himself to be a Labor Relations advisor;

> (b) Section 186 (b) was enacted by Congress to bring within the scope of the Act, persons not of the class set forth in Section 186 (a) and as defined in the Act. It was aimed at including within its condemnatory language persons other than "employers * * * persons who act as a labor relations expert, adviser or consultant to an employer * * *".

Count Two might perchance charge a violation of a state statute, condemning extortion, bribery, receiving money under false pretenses, etc., but it charges no offense denounced by the Act of Congress with which we are here concerned.

It has been held that:

> "* * * Where a particular class is spoken of and general words follow, the class first mentioned is to be taken as the most comprehensive and the general rules treated as referring to matters *ejusdem generis* with such class.
>
> The specific words of the statute are 'if any judge or clerk of any election authorized by law or any other persons' must be construed to mean other persons legally connected with such election, as officers or otherwise. * * *"

The indictment which charged the defendant and several other persons with violating a penal election statute did not describe them as coming within the class of persons at whom the statute was directed, viz: any judge or clerk of any election.

The Court's opinion was concluded as follows:

> "Our conclusion is that the indictment is fatally defective, in that it does not set forth with particularity the acts which defendant is attempted to be charged as being criminal under the statute,

and does not inform him of their character so as to enable him to prepare his defense. The judgment is reversed, and defendant discharged."

State v. Kreuger (1896), 35 S.W., 604-605-606 (134 Mo. 263).

In *United States v. Florida East Coast Ry. Co.*, CCA Fla. 22 F. 33, 36, the Court held that under the doctrine of *ejusdem generis, a train conductor is not included within the proviso of Section 2, 45 U.S.C.A., Sec. 62, relating to hours of service of operators, train dispatchers, or other employees who use the telegraph or telephone to dispatch, receive or deliver orders pertaining to train movements:*

"Where an act passed by the legislature embodies a definition, it is binding on the courts." (*Collins v. Texas,* 223 U.S. 288, 56 L.ed., 439) 50 Am. Jur. "Statutes", Section 262.

In the Indictment under which petitioner was convicted, he was charged with two separate and distinct offenses, viz: that of having conspired to violate Section 186 (a), although the wrongful acts set forth and defined in the Act are not at all mentioned in Count One and under Count Two with having unlawfully requested sums of money, etc., from Michigan Chrome. In other words, the position forced upon him was that like a person who attempts to be both "buyer and seller" in the one and same transaction. Conceding arguendo that Count Two charges that he, as one who was not a Labor Relations Expert in the words of the Act, but one who so represented himself to be, violated Section 186 (a), then *he is charged with paying, delivering, money or other things of value to an employer engaged in an industry affecting commerce.*

Under Count Two, it is charged that petitioner, described and defined in Count One as representing himself

to be a Labor Relations Advisor, that he did unlawfully, etc., request payment of an unspecified sum of money from officials of Michigan Chrome in violation of Section 186 (b) of Title 29, U.S.C.A.

In other words, he is charged in the two count indictment with being a payor as well as a payee,—as a consignor as well as being at the one and the same time a receiver. He is further charged with being, or at least representing himself to be an employee—Labor advisor of Michigan Chrome, and under Count Two, that he did unlawfully, etc., request payments of money from his own employer—Michigan Chrome,—in violation of Section 186 (b), which refers back to and includes the offense denounced by Section 186 (a) as stated in said Section 186 (b).

Assuming that petitioner had been charged in the language of Section 186 (a), the illegal act was in performing a service for his employer, Michigan Chrome, whereas under Count Two he is charged (considering the statute) with unlawfully, etc. requesting money from his said employer (assuming that Michigan Chrome was such) in violating subsection (a): That violation as a Labor Relations Advisor could only consist in paying moneys, etc. to a representative of the employees, to any labor organization, officer, etc., to any employee or group or committee of employees "for the purpose of causing such employees * * *, directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing", or "to any officer of a labor organization * * * to influence him in respect to any of his actions * * * as a representative of such labor organization" and not to his employer.

Thus it was attempted under Count One to charge that petitioner conspired to violate (a substantive act) an act

of benefit to his employer, Michigan Chrome, *and that under Count Two he demanded moneys from his said employer which obviously could not be of benefit to his employer.* The Act does not seek in the least to protect an employer but to protect labor organizations, employees who might wish to organize and to safeguard their right to bargain collectively through representatives of their own choosing.

Count One does not charge the commission of the substantive offense. It alleges a conspiracy to do certain acts not at all set forth in the Act. Count Two makes an abortive attempt to allege that by extorting or attemping to extort moneys from his employer (a state offense), petitioner as one alleging himself to others to be the employer's Labor Advisor, did so for the purpose as stated in Section 186 (a) of corrupting labor organizations, employees, etc. in his employer's behalf,—by extortion.

In the petition filed herein it is pointed out at p. 5, that counsel for the Government, in his closing argument commented upon the failure of defendant (Petitioner) to take the stand as a witness, so as to testify in his own behalf.

In *Griffin v. California* (1965), 88 S.C. 1229, this Court has said:

> (Syllabi) "Fifth Amendment in its direct application to federal government and its bearing on States forbids either comment by prosecution on accused's silence or instructions by the court, that silence is evidence of guilt. * * *
>
> Trial Judges and prosecutor's comment on defendant's failure to testify in California criminal case violates self incrimination clause of fifth amendment. * * *"

CONCLUSION

For the foregoing reasons, it is respectfully urged that this petition be granted, and that, upon further consideration, the Judgment of the United States Supreme Court be reversed.

CERTIFICATE OF COUNSEL

I, Earl T. Prosser, counsel for the above named petitioner, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

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